

IN THE
Supreme Court Of Missouri

No. SC95013

**JANET S. DELANA, INDIVIDUALLY, AND
AS WIFE OF DECEDENT TEX C. DELANA,**

Petitioner,

v.

**CED SALES, INC. D/B/A ODESSA GUN & PAWN,
CHARLES DOLESHAL, AND DERRICK DADY,**

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

**Appeal from the Circuit Court of Lafayette County, Missouri
The Honorable Dennis A. Rolf, Circuit Judge**

**BRIEF OF AMICUS CURIAE THE NATIONAL COALITION AGAINST
DOMESTIC VIOLENCE, THE NATIONAL DOMESTIC VIOLENCE HOTLINE,
THE NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER, AND THE
NATIONAL LATIN@ NETWORK: CASA DE ESPERANZA IN SUPPORT OF
THE PETITIONER JANET S. DELANA**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the National Coalition Against Domestic Violence, the National Domestic Violence Hotline, the National Indigenous Women's Resource Center, and the National Latin@ Network: Casa de Esperanza submit this brief in support of the Petitioner, and respectfully urge the Court to overturn the trial court and reinstate the Petitioner's negligence claim.

The National Coalition Against Domestic Violence provides a voice to victims and survivors of domestic violence. It strives to foster a society in which there is zero tolerance for domestic violence, and does so by influencing public policy, increasing public awareness of the impact of domestic violence, and providing resources to victims of domestic violence.

The National Domestic Violence Hotline is a nonprofit organization established in 1996 as part of the federal Violence Against Women Act (VAWA). It operates a free, confidential, around-the-clock call-in, internet chat, and text services center to offer victims of domestic violence compassionate support, crisis intervention information, and referral services to enable them to find safety and live lives free of abuse.

The National Indigenous Women's Resource Center seeks to enhance the capacity of American Indian and Alaska Native tribes, Native Hawaiians, and Tribal and Native Hawaiian organizations to respond to domestic violence.

The National Latin@ Network: Casa de Esperanza¹ seeks to mobilize Latinas and Latino communities to end domestic violence. Founded in 1982 to provide emergency shelter for women and children experiencing domestic violence, today, Casa de Esperanza has expanded its activities to conduct research on the intersection of domestic violence and Latino and Latina identity; to spearhead international work with organizations and governments in Latin America; and to lead the national NO MÁS campaign (the Spanish language analogue to the NO MORE campaign) to raise public awareness of domestic violence. In October 2011, the United States Department of Health and Human Services awarded it the Family Violence Prevention and Services Discretionary Grant, designating it a National Culturally Specific Special Issue Resource Center.

Amicus Curiae submit this brief because of the troubling implications of the trial court's ruling for the conduct of gun dealers, and the tragic consequences it may have for those at-risk for domestic violence. Guns can easily transform domestic violence into domestic homicide. Between 1980 and 2008, 2 out of every 3 victims murdered by a current or former spouse were killed using a gun,² a trend that unfortunately continued

¹ "Latin@" is a gender-neutral shorthand for "Latino" and "Latina" and reflects Casa de Esperanza's goal of being inclusive of genders.

² Alexia Cooper & Erica L. Smith, United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Homicide Trends in the United States*,

through 2011 and 2012.³ In its study of 2012 femicides (including both intimate and non-intimate partner homicides), the Violence Policy Center found that women were most commonly killed by men during the course of an argument, and that 49% of these homicides involved guns.⁴ Even when not resulting in homicide, guns are frequently used as part of a systematic pattern of abuse and control by one intimate partner over another. In a recent survey, Amicus Curiae the National Domestic Violence Hotline found that 1 in 10 respondents whose partners had access to a gun reported that their partner had fired it during an argument; 2 in 10 respondents whose partners had access to a gun reported that their partner had threatened to use it to harm them or their loved ones, or to commit suicide; 5 in 10 respondents believed they would feel safer if their partner's gun was confiscated; and 7 in 10 respondents believed their partner was capable of killing them.⁵

1980-2008, Annual Rates for 2009 and 2010, at 20 (Nov. 2011), available at <http://bjs.gov/content/pub/pdf/htus8008.pdf>.

³ Violence Policy Center, *When Men Murder Women: An Analysis of 2012 Homicide Data*, at 3 (2014), available at <http://www.vpc.org/studies/wmmw2014.pdf>.

⁴ *Id.* at 5.

⁵ The National Domestic Violence Hotline, *Hotline Firearms Focus Survey*, available at <http://www.thehotline.org/wp-content/uploads/2014/07/Final-Firearms-One-Page.pdf>.

Gun dealers can play a vital, gatekeeping role in protecting their communities from gun violence. By refusing to sell a gun to an individual the dealer knows to be dangerous or abusive, or who appears to be at risk of being a danger to herself or others, dealers can potentially prevent many acts of gun violence. But, as this case teaches, they can only be expected to play this role if there is a proper legal framework that holds them accountable for irresponsible gun sales. Without a legal deterrent, gun dealers will “race to the bottom” and limit themselves to conducting only the required background checks and otherwise continue to make profitable gun sales, no matter the risks posed. Given the acknowledged gaps in the background check system, this is an unacceptable result.

The FBI maintains the National Instant Criminal Background Check System (“NICS”), a database that identifies for gun dealers individuals who are prohibited from purchasing a firearm under federal law. The database is only as good as the data provided by state and local governments, however, and recent studies have shown considerable gaps. For instance, many states do not submit data on individuals convicted of domestic violence misdemeanors, or like Missouri, individuals subject to domestic violence restraining orders.⁶ Indeed, a recent study estimates that less than 5% of

⁶ Arkadi Gerney & Chelsea Parsons, *Women Under the Gun: How Violence Affects Women and 4 Policy Solutions to Better Protect Them*, Center for American Progress, at 22 (June 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolence2.pdf>.

domestic violence misdemeanor convictions are reflected in the NICS system.⁷ Meanwhile, other forms of domestic violence are never reported because of how they are classified under each state's individual laws.

The risks posed by an inadequate or insufficient regulatory and legal structure are on full display in this case. Like other gun dealers, Respondent CED Sales, Inc., d/b/a Odessa Gun & Pawn ("Odessa") placed its pecuniary interests ahead of any sense of moral or social responsibility, and thus limited its sense of responsibility to the absolute minimum of what it believed the law required – that is, running a background check that proved to be inadequate. Despite receiving independent warnings that Ms. Colby Weathers was a danger to herself and others, Odessa sold her a firearm that, *just one hour later*, she used to shoot and kill her father, Tex Delana, and that she used to attempt to commit suicide. The company's lack of remorse is shocking. Even knowing what they know now, Odessa's owner and manager maintain that, as long as Ms. Weathers passed the background check, they would have sold her a gun.

Unfortunately, the tragic circumstances surrounding Mr. Delana's death are an all-too-common occurrence. In January 2013, Dalton Stidham shot and killed his former girlfriend, her father, and her 12-year old cousin with a gun he purchased from H&K Gun

⁷ *Id.* at 21.

& Pawn Shop just five hours earlier.⁸ On January 8, 2011, Jared Lee Loughner shot and killed six and injured thirteen others (including Congresswoman Gabrielle Giffords) with ammunition he purchased just three hours earlier from Walmart.⁹ And on October 29, 2003, Michael Michalski drove to a gun store, purchased a gun, and drove to his former girlfriend's home, where he shot and killed his former girlfriend, her sister, and her current boyfriend.¹⁰

While Ms. Weathers did not complete her suicide attempt, there are also numerous examples of individuals killing themselves within hours of purchasing a gun. On June 10, 2011, Michelle Brook's mother traveled to Maine, purchased a gun from Kittery Trading Post, drove home, and shot herself in the head.¹¹ Within a span of five days in 2009, three New Hampshire residents shot and killed themselves hours after purchasing

⁸ Bill Estep & Valarie Honeycutt Spears, *12-year-old Girl Becomes Third to Die From Shooting at Hazard College*, Lexington Herald-Leader (Jan. 16, 2013), available at <http://www.kentucky.com/2013/01/16/2478339/12-year-old-critical-after-hazard.html>.

⁹ Letitia James, *Opinion: Divesting from Wal-Mart*, Brooklyn Daily Eagle (Aug. 4, 2015), available at <http://www.brooklyneagle.com/articles/2015/8/4/opinion-divesting-wal-mart>.

¹⁰ *Phillips ex rel. Estate of Phillips v. Northwest Regional Communications*, 391 F. App'x 160, 164 (3d Cir. 2010).

¹¹ Opinion, *Eternal Problem of Guns and Gun Control*, The Record (Bergen County, New Jersey) (Jan. 27, 2013).

guns from Riley's Sport Shop.¹² These are hardly isolated occurrences: approximately 2/3 of the approximately 30,000 gun-related deaths that occur every year are suicides,¹³ and some have estimated that nearly 1 in 10 of these suicides occurred within one week (and often within hours) of a gun purchase.¹⁴

These types of shootings expose the drawbacks of relying entirely on the NICS background check process and the tragedies that can result from a mistaken belief that the background check is the only inquiry that a gun dealer must perform before selling a gun. There are other laws that can compensate – to a limited extent – for these deficiencies by providing a meaningful deterrent to irresponsible gun sales, but only if they are properly construed and enforced against gun dealers. The lower court's ruling here threatens to undermine effective deterrence by sending the reverse message – that common law relief for irresponsible gun sales is no longer available in light of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 to 7903. For the reasons stated below,

¹² Chris Boyette, *The Gun Shop Owner*, The CNN Guns Project (Dec. 2014), available at <http://www.cnn.com/interactive/2014/12/us/cnn-guns-project/gun-shop-owner.html>.

¹³ Drew Desilver, *Suicides Account for Most Gun Deaths*, Pew Research Center (May 24, 2013), available at <http://www.pewresearch.org/fact-tank/2013/05/24/suicides-account-for-most-gun-deaths>.

¹⁴ New Hampshire Firearm Safety Coalition, *Suicide Prevention: A Role for Firearm Dealers and Ranges*, available at <http://www.nhfsc.org>.

Amicus Curiae the National Coalition Against Domestic Violence, the National Domestic Violence Hotline, the National Indigenous Women's Resource Center, and the Natinoal Latin@ Network: Casa de Esperanza, respectfully urge the Court to overturn the decision of the trial court, and thereby enable existing law to deter and remedy the domestic violence that results from inappropriate gun sales.

JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Amicus Curiae adopt and incorporate by reference the Jurisdictional Statement and Statement of Facts set forth in the Petitioner's Moving Brief.

INTRODUCTION

On June 25, 2012, Petitioner Janet S. Delana contacted Derrick Dady, the manager of Respondent CED Sales, Inc. d/b/a/ Odessa Gun & Pawn ("Odessa"), to inform him that her daughter, Colby Sue Weathers, had been diagnosed as having a severe mental illness, that she was a paranoid schizophrenic, and that she posed a danger to herself and others. (Compl. ¶¶ 26-30 (L.F.016-17); Dady Tr. 30:5-22 (L.F.139).) Ms. Delana pleaded with Mr. Dady not to sell her daughter a gun. Two days later, Mr. Dady sold Ms. Weathers a gun that, just one hour later, she used to shoot and kill her father, Tex Delana. (Compl. ¶¶ 39 & 42 (L.F.018).) When asked why he did nothing in response to Ms. Delana's phone call, Mr. Dady stated that as long as Ms. Weathers passed a background check, he had no independent responsibility to inquire further, and that it was Ms. Delana's responsibility to substantiate her telephone call with written documentation. (Dady Tr. 11:21-12:4 (L.F.135), 82:25-83:6 (L.F.145).) Mr. Dady went so far as to indicate that he did not understand why Ms. Weathers' mental condition was even relevant: "I mean, people kill guns – people kill people with guns all the time. I mean, it doesn't matter if they're mentally ill or not." (Dady Tr. 41:12-14.) Odessa's owner, Charles Doleshal, responded that, even knowing what he knows now, he would have made the sale because it is store policy to sell a gun to anyone who passes a background

check, and because he is not a doctor and has no way to assess whether someone is mentally ill or not. (Doleshal Tr. 75:23-76:7 (L.F.227), 118:10-21, 128:22-25 (L.F.231).)

Delana brought suit against Odessa, asserting claims for negligence, negligent entrustment, and negligence per se. Following discovery, Odessa moved for summary judgment on all three claims. It argued, among other things, that the negligence claim was preempted by the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901 to 7903. The PLCAA provides that a “qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). A “qualified civil liability action” is defined as “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” 15 U.S.C. § 7903(5)(A). The statute does not provide a private right of action, but it preserves those remedies available under state law that do not qualify as a “qualified civil liability action,” including actions for “negligent entrustment,” which the statute defines as actions where the seller “knows, or reasonably should know” that the purchaser is “likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.”

The trial court agreed that Ms. Delana’s claim that the store was negligent in making the sale was preempted by the PLCAA. It also ruled that Ms. Delana’s claim for negligent entrustment, which (as noted above) would not be preempted by the PLCAA, is

not available against a gun salesman under Missouri Law. In combination, these rulings had the effect of immunizing Odessa from liability for its own negligent conduct in selling a gun to Ms. Weathers.

Amicus Curiae believe that the trial court erred when ruling that the PLCAA preempts Ms. Delana's negligence claim, and that this claim should be found viable regardless of whether there is an independent claim for negligent entrustment under Missouri Law. When Congress legislates in a field traditionally occupied by the States, such as in the area of tort liability, the federal statute is presumed not to preempt state law, and is to be narrowly construed in order to alleviate inherent constitutional concerns. Here, a narrow construction of the PLCAA militates in favor of finding that the statute does not preempt the negligence claim asserted here, for two principal reasons: first, because the PLCAA was not intended to immunize gun sellers from the type of tort claim that was asserted here; and second, because Ms. Weathers did not engage in the requisite "criminal or unlawful misuse of a qualified product" as that term is properly defined under the PLCAA, as she was adjudged by the State of Missouri to not be criminally responsible for her conduct.

For these and other reasons, Amicus Curiae respectfully urge the Court to vacate the trial court's ruling and reinstate Ms. Delana's negligence claim.

LEGAL ARGUMENT

I. The Trial Court's Broad Interpretation of the PLCAA Raises Serious Constitutional Concerns.

The trial court broadly construed the preemptive reach of the PLCAA in a manner that infringed on constitutional principles intended to protect against federal preemption of matters ordinarily reserved to the states. Common law rights of recovery, especially in the area of tort law, have traditionally been within the province of state law. Indeed, the United States Supreme Court has recognized that it is an open question whether it is a violation of due process to abrogate common law rights of recovery without providing some type of substitute remedy. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 87-88 (1978). Although that question remains unresolved, in recognition of the federalism concerns provoked by the preemption of state common law, the United States Supreme Court has held that where a federal statute addresses an area of traditional state concern, there is a general presumption against preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996). When “the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Consistent with these principles, in enacting the PLCAA, Congress expressly stated its intent to “preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.” 15 U.S.C. § 7901(b)(6).

Consistent with the principles of federalism recognized by the United States Supreme Court, and in order to avoid unnecessary constitutional risks, the lower court should have interpreted the PLCAA in a manner that limited the law's preemptive effect and thereby allowed Ms. Delana to proceed with her negligence claim.

II. Petitioner's Negligence Claim is Not a "Qualified Civil Liability Action" that is Preempted by the PLCAA Because It Seeks Relief for Conduct that the Statute is Not Intended to Protect from Civil Liability.

Section 7903(5)(A) of the PLCAA provides that a "qualified civil liability action" does not include "an action brought against a seller for negligent entrustment." The statute defines "negligent entrustment" as the "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others," 15 U.S.C. § 7903(5)(B). Ms. Delana's negligence claim seeks relief for this exact conduct: it alleges that Odessa sold a gun to Ms. Weathers when it knew, or reasonably should have known, that Ms. Weathers was likely to use the gun to harm herself or others, and that Ms. Weather did in fact use the gun to kill her father and attempt to commit suicide. (*See* Compl. ¶¶ 65-67 (L.F.023).)

In ruling that the PLCAA preempted Ms. Delana's negligence claim, therefore, the trial court effectively insulated the Respondents from liability for the very same conduct that the statute explicitly exempts from its preemptive reach. Whether an individual state

or litigant labels a cause of action for this conduct as negligence, negligent entrustment, wrongful sale, or otherwise, is of no moment. Congress made a legislative judgment to preserve state law causes of action involving this type of conduct. To hold that a claim is preempted simply because it is not labeled “negligent entrustment” ignores the definition provided in 15 U.S.C. § 7903(5)(B), and is thus contrary to the plain terms and intended meaning of the PLCAA.

III. Petitioner’s Negligence Claim is Not a “Qualified Civil Liability Action” Preempted by the PLCAA Because It Did Not Arise Out of a “Criminal or Unlawful Misuse of a Qualified Product”

The PLCAA defines a “qualified civil liability action” as a “civil action or proceeding . . . against a manufacturer or seller of a qualified product . . . for damages . . . **resulting from the criminal or unlawful misuse** of a qualified product by the person or a third party.” 15 U.S.C. § 7903(5)(A) (emphasis added). The term “criminal misuse” is nowhere defined in the statute, and the term “unlawful misuse” is defined as “conduct that **violates** a statute, ordinance, or regulation as it relates to the use of a qualified product,” 15 U.S.C. § 7903(9) (emphasis added). The trial court did not identify any “statute, ordinance, or regulation” that had been violated. Instead, it broadly interpreted the statute to preempt any cause of action resulting from a “criminal act,” and concluded that Ms. Weathers’ act of shooting Mr. Delana was a criminal act, even though, in light of her mental condition, she was never convicted of a crime. (March 6, 2015 Hearing Tr. at 8:23-25.)

The language in question is equally susceptible to more narrow interpretations. For example, it can readily be construed to apply only where the shooting resulted in a criminal conviction. Doing so would comport, not only with a plain textual reading of the statute, but also with the design of the statute to preempt common law claims only in circumstances where: (i) there is no wrongful conduct by the gun store associated with the sale; and (ii) the harm suffered is attributable to culpable conduct by the shooter. *See* 15 U.S.C. § 7901(b)(1) (Congressional finding that the PLCAA is intended to “prohibit causes of action against manufacturers, distributors, dealers, and importers. . . for the harm solely caused by the criminal or unlawful misuse of [guns] by others”). Here, the shooter, Ms. Weathers, did not engage in culpable conduct, since she pled not guilty by reason of mental disease or defect to charges by the State of Missouri arising out of the shooting. Under Missouri law, a “person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person’s conduct.” R.S. Mo. § 552.030. Therefore, when the criminal court accepted Ms. Weathers’ plea, she was found not to have been responsible for any type of criminal or unlawful conduct in connection with the shooting, and not to have engaged in “criminal or unlawful misuse” that would cause the Petitioner’s negligence claim to be preempted.

In short, because the term “criminal or unlawful misuse” is susceptible to being interpreted in a way that avoids preemption of the Petitioner’s negligence claim while effectuating Congress’s purpose in enacting the PLCAA, the trial court’s ruling was in error. The court should have limited the preemptive reach of the phrase “criminal or

unlawful misuse” to conduct that is adjudged to be criminal or that violated a specifically identified “statute, ordinance, or regulation as it relates to the use of a qualified product,” thereby fulfilling the statutory goal of preserving common law claims for relief against culpable gun sellers.

CONCLUSION

For the reasons stated above, Amicus Curiae the National Coalition Against Domestic Violence, the National Domestic Violence Hotline, the National Indigenous Women's Resource Center, and the National Latin@ Network: Casa de Esperanza respectfully urge this Court to vacate the trial court's judgment and to reinstate the Petitioner's negligence claim.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.05 (CONSENT TO FILE)

Pursuant to Missouri Supreme Court Rule 84.05(f)(3), the undersigned certifies that counsel for the Petitioner, the Respondents, and Intervenor The United States have consented to the filing of the foregoing Brief of Amicus Curiae on behalf of the National Coalition Against Domestic Violence, the National Domestic Violence Hotline, the National Indigenous Women's Resource Center, and the National Latin@ Network: Casa de Esperanza.

/s/ Daniel L. Allen

CERTIFICATE OF COMPLIANCE WITH RULES 55.03 and 84.06

The undersigned certifies that the foregoing Brief of Amicus Curiae includes the information required by Missouri Supreme Court Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of Amicus Curiae is 4,051 exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the Brief of Amicus Curiae that was electronically filed with the Missouri Supreme Court was scanned for viruses and was found virus-free through the Symantec Endpoint Protection anti-virus program.

/s/ Daniel L. Allen

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September, 2015, a copy of the foregoing was electronically filed with the Missouri Supreme Court, which caused copies to be electronically served on all counsel of record in this action.

/s/ Daniel L. Allen _____